(2)

No. 03-518

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2003

STATE OF ARIZONA,

Petitioner,

v.

ARTURO ANDA CANEZ

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Pursuant to Rule 39, Rules of the Supreme Court, Respondent, Arturo Anda Canez, hereby moves for leave to proceed *in forma pauperis* in the above-captioned action on the ground that he lacks sufficient funds to pay for fees and expenses. An affidavit by Petitioner declaring his indigency is attached to the motion. [*See* Attached Exhibit A.]

Petitioner is incarcerated under a sentence of death in the Special Management Unit I, Arizona State Prison Complex - Eyman in Florence, Arizona. Petitioner has been declared indigent and has been appointed counsel in the State of Arizona. For these reasons, Petitioner asks that this Court grant this motion and allow him to proceed *in forma pauperis*.

///

Respectfully submitted this 17 day of November, 2003.

THOMAS J. PHALEN, ESQ.
TARA K. ALLEN, ESQ.

By: Thomas J. Phalen
Thomas J. Phalen (Counsel of Record)
Attorney for Respondent Canez

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AFFIDAVIT OF INDIGENCY

I, Arturo Anda Canez, being first duly sworn, do depose and state that in support of my brief in opposition to Arizona's Petition for Writ of Certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of petitioning for a Writ of Certiorari are true.

1. Are you presently employed? No.

A. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. N/A

B. If the answer is no, state the date of your last employment and the amount of the salary or wages per month which you received. I have not been employed since 1996, when I was incarcerated prior to my capital trial. I have been incarcerated since that date and am presently on Arizona's death row.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? No.

A. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months. N/A

3. Do you own any cash or checking or savings account? No.

A. If the answer is yes, state the total value of the items owned. N/A

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property excluding ordinary household furniture and clothing? No.

A. If the answer is yes, describe the property and state its approximate value. N/A

5. List the persons who are dependent upon you for support and state your relationship to those persons. My wife and children do not receive any support from me as I am on death row in Arizona.

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

OFFICIAL SEAL
BARBARA SHEARER
NOTARY PUBLIC - State of Arizona
PINAL COUNTY
My Comm. Expires May 15, 2007

Arturo Canez
ARTURO ANDA CANEZ

Duly witnessed and sworn before me, a Notary Public, this 13 day of Nov., 2003.

Barbara Shearer
NOTARY PUBLIC

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ON PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

I. In *Ring v. Arizona*, 536 U.S. 584 (2002)(*Ring II*), this Court held that the Sixth Amendment requires that a jury decide all facts necessary to increase the maximum sentence in a murder case from life to death. Aggravating factors in Arizona act as the functional equivalent of elements of the aggravated crime of capital murder. Under Arizona law, a capital defendant may not be sentenced to the maximum sentence of death, even when one or more aggravating factors have been proved, unless a determination is made that the mitigation evidence is not "sufficiently substantial to warrant leniency."

II. Did the Arizona Supreme Court err when it held that the imposition of the death sentence was not harmless because it could not conclude beyond a reasonable doubt that a reasonable jury would not have found that two of the aggravating factors in Respondent's case had been proved and that it could not conclude beyond a reasonable doubt "that no rational trier of fact would determine that the mitigating circumstances were sufficiently substantial to call for leniency."

III. Is the harmless error analysis of the imposition of a death sentence employed by the Arizona Supreme Court in post-*Ring* capital cases a matter of state law, not reviewable by this Court on petition for writ of certiorari?

JURISDICTION

Respondent urges that this Court lacks certiorari jurisdiction over questions of state law that the petition raises.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the Sixth and Fourteenth Amendments set forth in the petition, this case involves the Eighth and Tenth Amendments to the United States Constitution.

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Tenth Amendment provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people.

STATEMENT OF THE CASE

I. Arizona Capital Punishment Law After *Ring v. Arizona*

Immediately after this Court's *Ring* decision, the Arizona legislature was convened in special session to enact a new death sentencing statute. That statute was expressly made applicable to all cases in which direct appeal had not been finally resolved. 2002 Ariz. Sess. Laws, 5th S.S., Ch.1, § 7(A). The statute provided for a jury determination of all issues relating to guilt and sentence: defendant's guilt of first degree murder, the presence of aggravating circumstances, and the existence of sufficient mitigating circumstances to outweigh the aggravating circumstances. A.R.S. § 13-703.01.

Shortly thereafter, the Arizona Supreme Court consolidated all capital cases before it on

direct appeal, including Mr. Canez', for argument in *Ring*. In its decision in that case, the Court held, contrary to consolidated appellants' arguments, violations of Ring's jury trial right could be held harmless. *State v. Ring*, 65 P.3d 915, 933-936 (Ariz. 2003)(*Ring III*). The Court held that a sentence could be affirmed on the theory that the error was harmless, if and only if the Court could conclude, that "no reasonable jury would have failed to find the factor established beyond a reasonable doubt" and "that no rational trier of fact would determine that the mitigating circumstances were sufficiently substantial to call for leniency." *Id.* at 946. This standard is substantially the same as Arizona's pre-*Ring* law regarding other forms of constitutional error in capital sentencing decisions by judges. *State v. Valencia*, 645 P.2d 239, 241 (Ariz. 1982)(refusing to affirm death sentence "[w]here there is a doubt whether the death sentence should be imposed"). However, it had another basis as well: the Arizona Supreme Court's determination that the legislature's intent would be frustrated if different sentencers evaluated the presence and strength of aggravation and mitigation. *Ring III*, 65 P.3d at 943; *see also State v. Bible*, 858 P.2d 1152, 1212 (1993)(expressing strong preference for remand where there is error in a capital sentence because fairness and accuracy are promoted by single factfinder who can consider all evidence).

II. Respondent's Case

A. Mr. Canez' Traumatic Childhood and Dysfunctional Family

Canez' family history included being chained to the family dining room table as a small boy because of an undiagnosed attention deficit hyperactivity disorder (Tr. 9/1/98 at 63), witnessing his father attempt suicide with a knife (*Id.* at 69), witnessing his father attempt to kill his mother (*Id.* at 71), among other horrors. The court found that these were proved but said his traumatic childhood and dysfunctional family history "*is* not *sufficiently connected* to his conduct at the time of the

offense to constitute a *substantial* relevant mitigating circumstance." (The court acknowledged in *rejecting* the mitigating evidence that Appellant had endured "violence, suicide, mental illness and poverty." (Tr. October 27, 1998 at 24)).

B. Mr. Canez' Other Mitigation Evidence

Appellant demonstrated that he was mentally retarded (Tr. 9/1/98 at 79; Tr. 10/2/98 at 47-48), suffered from seizures and took seizure control medication (Tr. 9/1/98 at 80: Tr. 10/2/98 at 47-48)), suffered a depressive disorder (Tr. 10/2/98 at 47-48) was education deprived and illiterate (10/2/98 at 34), showed evidence of organic brain damage (Tr. 10/2/98 at 37, 38, 47-48 and 104) for which further testing would likely have revealed structural damage (Tr. 10/2/98 at 110) and was likely a cocaine addict and intoxicated on alcohol and crack cocaine (Tr. 10/2/98 at 47-48) at the time of the offense.

The evidence demonstrated that Appellant consumed substantial quantities of alcohol and crack cocaine prior to the murder. Appellant was either severely intoxicated or experiencing severe craving. In *State v. Rossi*, 154 Ariz. 245, 250-51, 741 P.2d 1223 (1987), the Arizona Supreme Court noted that "addiction fosters an insatiable and life-controlling craving for additional drugs that overwhelms the user's ability to control his behavior." The Arizona Supreme Court has also correctly noted that cocaine "affects the mental state of a user . . . often producing a toxic psychosis, including bizarre mental states and abnormal behavior." *State v. Plew*, 155 Ariz. 44, 48, 745 P.2d 102, 106 (1987).

Canez raised and proved the following additional mitigating factors: felony murder instruction; good character; love of family; appropriate conduct in court; disparate sentence of co-defendant.

The co-defendant (Patterson) is the only person who admitted involvement in this crime. The co-defendant had a mental condition of sufficient severity that the *state* requested a Rule 11 mental competency examination of him, raising a reason for concern for his memory, credibility, reliability and sanity. The co-defendant had a drug problem of long duration for which he was in treatment or counseling. The co-defendant is white, Appellant is Hispanic. Co-defendant won the race to the prosecutor's office and was rewarded for it. The co-defendant's narration of the events changed substantially *three times* before he settled on the one that was presented at trial.[1] ("At trial, Patterson

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[1]Patterson's testimony changed substantially with regard to the facts of the night of February 23, 1996 from one interview to the next, and his pretrial testimony also differed significantly from his testimony at trial. He testified that he believed that Detective Merchant "was trying to make a story fit into what he believed may have happened." (RT 01/28/98, 40.) He lied during the first interview about his overall involvement in the crime and about his extensive drug use on that day, during which he smoked crack cocaine twelve separate times. (RT 01/29/98, 48, 56-57; 87-88.) During his first interview with police, Patterson told them that the man he'd been with that night was a 5'6" Mexican male who weighed 250 lbs. (RT 01/29/98, 53.) Patterson stated that he had met Donna Thacker and Kathy Shepherd several times at the Triple X Bar and had seen them at the barn approximately two weeks prior to the night of February 23, 1996. However, both women testified that they had never seen Patterson before that night. (RT 01/29/98, 58-62.) Patterson lied about which clothes he was wearing the night of February 23, 1996. (RT 01/29/98, 65-66.)

Patterson changed his story about whether he initially went to the door of the victim's house or stayed in the truck. (RT 01/29/98, 37-38; 71-72.) He noted in his trial testimony, but not in any pretrial statements, that the defendant had a glove on the night of February 26, 1996. (RT 01/29/98, 77; RT v.9, 139.) During his first interview with Detective Merchant, Patterson did not mention that any strangling of the victim occurred, but in a later interview he stated that the defendant strangled the victim "for a few minutes," then corrected himself and stated "[n]ot a few minutes, but a few seconds." (RT 01/28/98, 78-79.) Patterson's story about how many times he saw the defendant hit the victim with the frying pan changed from one time to two or three times. (RT v.9, 139.)

Detective Hercel Merchant was very forceful in his questioning of Patterson during both the February 26 and March 6, 1996 interviews, applying substantial pressure and at times supplying Patterson with missing facts. (RT 01/29/98, 73; RT v.9, 136-139.) In particular, Detective Merchant reminded Patterson that Patterson had seen the knife on the chair at the victim's house when Patterson, after continued questioning on the subject, could not come up with that detail. (RT 01/28/98, 97-99; 129-131; RT v.9, 136-139.)

alternatively denied the validity of three separate and conflicting prior statements about the events on the night of the murder or stated that he could not recall making them." *State v. Canez*, ___ Ariz. ___, 74 P.3d 932 (2003) (Petitioner's Appendix A) at ¶ 11) There was virtually no physical evidence connecting Appellant to the crime. Co-defendant, however, had several cuts and bruises on his person when he was arrested and admitted he was a participant. The co-defendant was overheard bragging about the "sweet deal" he received for a murder *he had committed.* The co-defendant complained that he should have used a non-stick fry pan to bash in Mr. Hale's skull. The co-defendant authored a written confession to the crime in which he exonerated Canez from any involvement in the murder. The co-defendant received a sentence of ten years. Canez received death.

C. The Crime

The facts of the crime are as set out in *Canez I, State v. Canez*, 202 Ariz. 133, 42 P.3d 564 (2002) and *Canez II, State v. Canez*, ___ Ariz. ___, 74 P.3d 932 (2003) (Petitioner's Appendix A)

D. The Capital Trial and Sentencing

On February 5, 1998, a jury found Canez guilty of felony murder, first degree burglary, and two counts of armed robbery. *State v. Canez*, 202 Ariz. 133, 145, ¶ 15, 42 P.3d 564, 576 (2002). After the jury finding of guilt, the trial judge alone conducted a separate factfinding hearing to determine the existence or non-existence of aggravating and mitigating circumstances, and whether Mr. Canez should live or die. *See* A.R.S. § 13-703(B)(1997).

1. The Mitigating Evidence

The mitigating evidence that was presented is as narrated above. The Arizona Courts' treatment and consideration of the mitigating evidence is as detailed at *State v. Canez*, ___ Ariz. ___, 74 P.3d 932 (2003)(Petitioner's Appendix A) at ¶ 17-¶ 22 .

2. The Aggravating Factors

The judge, acting alone without the input of the jury, The court found four aggravating factors: 13-703(F)(2), (F)(5), (F)(6) and (F)(9), that mitigating circumstances were not sufficiently substantial call for leniency, and that Mr. Canez was the only person who killed the victim. The court sentenced Mr. Canez to death. (R.O.A. #238, 239) The Arizona Supreme Court reversed the findings on part of one of the aggravating circumstances, ARS 13-703(F)(6), determining that the murder was not heinous or depraved.

3. The Judge's Sentencing Decision

The defense proved by a preponderance of the evidence a wealth of mitigating mental health and familial history mitigating evidence. *See State v. Canez* (*Canez II*), ___ Ariz. ___, 74 P.3d 932 (2003)(Petitioner's Appendix A) at ¶ 17-¶ 22 The defense also proved that Canez was mentally retarded. *See id.* at ¶ 23-¶ 27. The judge, however, concluded that much of this evidence, when considered separately and collectively, was not "causally linked" to the crime, and therefore merited no weight. *See State v. Canez* (*Canez I*), 202 Ariz. 133, 42 P.3d 564 (2002) at ¶ 116, ¶ 119 ("The trial court acknowledged that Canez had endured 'violence, suicide, mental illness, and poverty' as a child, but determined that these experiences were 'not sufficiently connected to his conduct at the time of the offense to constitute a substantial relevant mitigating circumstance.' A defendant's difficult childhood is mitigating only where causally connected to his offense."); and ¶ 122.

The judge then made the unilateral decision to impose the death penalty, as Arizona's sentencing statute then authorized. *See also* A.R.S. § 13-703(E).

E. The Direct Appeal

Considering the information never heard by any juror, the Arizona Supreme Court upheld

the trial court's finding of the four aggravating circumstances. *See Canez I, supra.* The Court also upheld the trial court's refusal to find a causal connection between Mr. Canez' social history and mental health evidence and his behavior at the time of the crime. The Court based this decision on a credibility choice between the state and defense experts in testimony never presented to the jury.

F. Canez II

Following this Court's decision in *Ring v. Arizona,* 536 U.S. 584 (2002) (*Ring II*), the Arizona Supreme Court reconsidered Canez' case. *State v. Canez* (*Canez II*), ___ Ariz. ___, 74 P.3d 932 (2003)(Petitioner's Appendix A). The Court found exempt from *Ring II* the trial court's finding of the prior convictions aggravating factor. The Court also concluded that the age of the victim aggravating factor was proved beyond a reasonable doubt and that the error in depriving Canez of a jury determination on this factor was harmless beyond a reasonable doubt. The Court however, reversed the findings on the remaining two aggravating factors: that the murder was motivated by a desire for pecuniary gain and that the murder was committed in an especially heinous, cruel or depraved manner.

The *Canez II* Court stated:

> After reviewing the evidence, we cannot say beyond a reasonable doubt that a reasonable jury would not have found that Canez proved some of the mitigating factors that the trial judge found were not proven. Furthermore, we cannot say beyond a reasonable doubt that a reasonable jury would not have weighed differently the aggravating or mitigating factors that were found or determined that the mitigating factors were "sufficiently substantial to call for leniency." A.R.S. § 13-703(E). Therefore, we conclude that the *Ring II* error was not harmless in this case. *Id.* at ¶ 22

As a matter of law, the Court vacated the sentence of death and remanded for jury findings on each of those elements of the crime of capital murder. Petitioner now asks this Court to reverse

that decision.

REASONS FOR DENYING THE WRIT

I. THE ARIZONA SUPREME COURT VACATED THE DEATH SENTENCE ON THE ALTERNATIVE GROUND THAT CANEZ IS MENTALLY RETARDED AND THEREFORE IMMUNE FROM THE DEATH PENALTY UNDER *ATKINS V. VIRGINIA.*

The Arizona Supreme Court's Order vacating the death sentence and remanding to the trial court was two-fold. First, the Arizona trial court was ordered to determine whether Canez was mentally retarded under *Atkins v. Virginia*, 536 U.S. 304 (2002) and therefore not eligible for the death penalty at all. Only after that inquiry, was the trial court ordered to conduct a jury sentencing hearing. The *Canez II* Court said:

> We remand to the trial court to determine whether Canez has mental retardation and therefore is ineligible to receive the death penalty. In making this determination, the trial court should follow the principles announced in *Atkins* and the procedures set forth in A.R.S. § 13-703.02, to the extent possible given the post-trial posture of this case. If the court determines that Canez has mental retardation, the court shall resentence Canez to life or natural life in prison. *See id.* § 13-703.02(A). If the court determines that Canez does not have mental retardation, the court shall conduct a resentencing hearing before a jury. *Id.* at ¶ 27

The *Canez II* Court noted that the evidence supporting Mr. Canez mental retardation claim was quite compelling:

> As discussed above, the evidence presented at Canez's sentencing established that his full-scale IQ was 70, placing him squarely within *Atkins'* definition of subaverage intellectual functioning. Additional evidence established that Canez attended special education classes during grade school, demonstrating that any subaverage mental abilities may have manifested before age 18. Most important, however, is the fact that the evidence concerning Canez's mental abilities was considered only from the viewpoint of establishing mitigation, not as a potential bar to execution. *Id.* at ¶ 26

Petitioner seeks the imposition of a death sentence upon Canez. But he is very likely constitutionally immune from such a sentence, under the Eighth Amendment and *Atkins*, regardless

of the outcome of the litigation of this case. Because the remand to the trial Court was based on alternative grounds, one of which is likely to be dispositive of this case, and which will moot the questions presented, this Court should not grant certiorari.

II. THIS COURT DENIED CERTIORARI IN *ARIZONA V. PANDELI*, WHICH RAISED THE PRECISE QUESTIONS RAISED IN THIS CASE.

This Court denied the state of Arizona's petition for writ of certiorari in *Arizona v. Pandeli*, Case No. 03-15, on October 14, 2003. The questions presented to this Court in *Pandeli* were identical to those raised in this case. Both *Pandeli* and *Canez* were among the group of cases consolidated for review and which resulted in the Arizona Supreme Court decision in *Ring III*, *supra*.

III. THE ARIZONA SUPREME COURT'S DECISION RESTS ON AN INTERPRETATION OF STATE PROCEDURAL LAW, AND REACHES A RESULT THIS COURT SAID WAS PERMISSIBLE IN *CLEMONS V. MISSISSIPPI*.

The state's real dispute is not with the Arizona Supreme Court's application of their holdings in *Ring III* to the decision in *Canez II*. The state actually seeks review of the holdings in *State v. Ring*, 65 P.3d 915 (Ariz. 2003)(*Ring III*). But the state did not seek either reconsideration of that decision in the Arizona Supreme Court, or certiorari review in this Court; instead electing to challenge that decision indirectly in Mr. Canez' case. Nevertheless, it is to *Ring III* that this Court must look to examine the basis for the outcome here. Doing so, it is apparent the state court acted well within its prerogative in both cases.

In *Ring III*, the Arizona Supreme Court held that the existence of one aggravating factor which is exempt from *Ring II*, implicit in a jury's verdict, or supported by overwhelming or uncontroverted evidence, does not end that court's harmless error inquiry. The court explained that

"the procedures urged by the State [to end the harmless error inquiry after the finding of one aggravator is deemed harmless] do not reflect any sentencing procedure ever adopted by our legislature." *Ring III*, 65 P.3d at 943. The court went on to describe the consistency of Arizona's statutory capital sentencing scheme that has always "assigned to the same fact-finder the responsibility for considering both aggravating and mitigating factors, as well as for determining whether the mitigating factors, when compared with the aggravators, call for leniency." *Id.* The court explained "[t]he process involved in determining whether mitigating factors prohibit imposing the death penalty plays an important part in Arizona's capital sentencing scheme. [It refused to] speculate about how the State's proposal would impact this essential process." *Id.* The court then cited to *Johnson v. Nevada*, 59 P.3d 450 (Nev. 2002), holding that *Ring II* as applied to Nevada law requires a jury to reweigh mitigating and aggravating factors. *Id.* The court held the same result obtained here.

The court later discussed the need to have a jury decide mitigating circumstances under Arizona law: "Arizona's statutes require more than the presence of one or more statutorily defined aggravating factors to impose the death penalty." *Id.* at 946. Citing Arizona's statute, the court concluded: "[b]ecause a trier of fact must determine whether mitigating circumstances call for leniency, we will affirm a capital sentence only if we conclude, beyond a reasonable doubt, that no rational trier of fact would determine that the mitigating circumstances were sufficiently substantial to call for leniency." *Id.* In Respondent's case, the court specifically referred to the state law discussion in *Ring III*, also citing the Arizona statute at issue, A.R.S. § 13-703. *Canez II* at ¶ 5, ¶ 22.

This result is permissible under this Court's jurisprudence and dictated by the nature of

Arizona's capital sentencing scheme. Arizona is a weighing state. *See State v. Richmond*, 886 P.2d 1329 (1994). In *Clemons*, this Court held that, when constitutional error occurred in a capital sentencing, appellate courts in weighing states could conduct harmless error review, but also could remand for resentencing. *Clemons v. Mississippi*, 494 U.S. 738, 754 (1990)(decision to reweigh or remand "is for state appellate courts. . .to make.")(footnote omitted). As explained above, the Arizona Supreme Court has decided, in deference to the Arizona legislature's policy of requiring pure jury sentencing, it should remand in all cases where it cannot say beyond a reasonable doubt that no reasonable jury would have imposed death. That is clearly a permissible choice under *Clemons*.

In fact, Respondent argues below that it is the only constitutionally permissible choice, as this sort of error is not properly subject to harmless error review. *See* Argument ____ *infra*. Although the Arizona Supreme Court held otherwise, its determination of the form that harmless error review should take and the result that review should have in cases such as Respondent's, was reasonable and well within the parameters set by this Court in *Clemons*.

This Court does not sit to review such decisions of state criminal procedure and state sentencing policy. *See* Sup.Ct. R. 10; *Coleman v. Thompson*, 501 U.S. 722, 730 (1991)("if resolution of a federal question cannot affect the judgment, there is nothing for th[is] Court to do."). This Court has given its guidance regarding the Sixth Amendment in *Ring II*. It now should "give state judges a clear[ ] opportunity to develop state jurisprudence unimpeded by federal interference." *Arizona v. Evans*, 514 U.S. 1, 7 (1995), *quoting Michigan v. Long*, 463 U.S. 1032, 1041 (1983). Even if this Court were to review the state law decision in this case, it would find that the Arizona Supreme Court's decision is a sensible one and is true to the legislative intent that was the Arizona

Supreme Court's guide. Arizona has always viewed capital sentencing as something that involves qualitative as well as quantitative determinations. *State v. Van Adams*, 984 P.2d 16, 29 (Ariz. 1999)(noting that supporting evidence of cruelty "affects the strength of the cruelty factor, not its existence"), *citing State v. McKinney*, 917 P.2d 1214, 1225 (Ariz. 1996) (when conducting an independent review of the evidence, consideration is given to the "quality and the strength" of the aggravating and mitigating factors). The Court has long recognized that Arizona's capital sentencing statute "does not require that the number of aggravating circumstances be weighed against the number of mitigating circumstances." *State v. Mauro*, 766 P.2d 59, 81 (Ariz. 1988); *State v. Brookover*, 601 P.2d 1322, 1326 (Ariz. 1979)("One mitigating circumstance. . .may be 'sufficiently substantial' to outweigh two aggravating circumstances."). The Court has explained:

> We do not believe the legislature intended the court to play a numbers game and automatically apply the death penalty when the number of aggravating circumstances found exceeded the number of mitigating circumstances found, any more than it intended to require life imprisonment when the number of mitigating circumstances found exceeded the number of aggravating circumstances found.
> *State v. Valencia*, 645 P.2d 239, 241 (Ariz. 1982).

For this reason, as the Arizona Supreme Court noted, the Arizona legislature has always felt it appropriate to put all decisions relating to capital sentencing–aggravation, mitigation, and penalty--in the hands of a single sentencer, who can bring the same qualitative judgment to the assessment of aggravation, mitigation and penalty. *Ring III*, 65 P.3d at 943.

This case shows why that approach makes sense. The mitigating evidence adduced in this case and found credible by the Arizona Supreme Court went both to the severity of the aggravating factors alleged, as well as the magnitude of the mitigation. The mitigating evidence and information regarding Canez' mental state and history adduced below went both to the severity and weight to be

given to the aggravating circumstances as well as the mitigation to be weighed against them. The aggravating facts were directly related to the Canez' background and disorders. To view those aggravating facts in isolation and without the truer picture provided by the life history information would be to fail to fully assess their weight, as well as their identity and number, which Arizona requires. To artificially divide up the task of assessing aggravation and mitigation in light of such background facts would increase the chance of error and arbitrariness in capital decision making in violation of the Eighth Amendment. That is why the Arizona legislature felt it appropriate to put the sentencing decision in the hands of a single sentencer, under both statutory regimes. That is why the Arizona Supreme Court decided to follow that state legislative dictate in this case and the others it reviewed after *Ring II.*

Arizona's decision to do so does not offend or contravene anything in the federal constitution, or this Court's applicable decisions. To the contrary, it is a choice specifically left open to the states by *Clemons*, and by *Ring II. Ring II*, 536 U.S. at 609, n.7. The exercise of that choice does not call for certiorari review by this Court.

Petitioner emphasizes the different results obtained by several state courts in applying *Ring II* to individual state sentencing schemes. This result, however, obtains because each state sentencing scheme is unique, and each state's law must be applied to that scheme in light of state policy and practice. As noted in *Ring III*, the Nevada Supreme Court's decision on this issue was controlled by Nevada law.

Similarly, in *Woldt v. Martinez*[2], 64 P.3d 256, 262 (Colo. 2003), the Colorado Supreme Court held that Colorado's "three-judge panel capital sentencing statute. . .is unconstitutional on its face

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[2]Petition for writ of certiorari denied October 6, 2003.

under *Ring*" but that defendants sentenced under that statute were entitled to resentencings "under Colorado law[.]". The court cited to Colorado law interpreting the Colorado death penalty statute in determining which jury findings were eligibility findings. *Id.* at 264 (*quoting People v. Dunlap*, 975 P.2d 723 (Colo. 1999)).

The legal landscape developing after *Ring II* may not be homogenous, but it is not in conflict. Each state has interpreted this Court's decision according to their state capital punishment laws and, as long as those decisions do not violate the requirements of *Ring II* and were left open to them in *Clemons*, that is all this Court requires.

IV. THE ARIZONA SUPREME COURT'S DISPOSITION OF THIS CASE CAN AND SHOULD BE AFFIRMED ON OTHER GROUNDS.

If certiorari were granted, this Court would have to consider whether the Arizona Supreme Court's decision is correct for other reasons that were argued to it, but not necessarily adopted by it before considering relief on the grounds urged by Petitioner. There are a number of such reasons which should lead this Court to affirm the decision below. *Arizona v. Fulminante*, 499 U.S. 279, 282 (1991)(decision may be affirmed on grounds other than those stated by lower court).

A. Denial of the Jury Trial Right Guaranteed by Ring is Structural Error That Should Not be Subject to Harmless Error Review.

This Court has held that unlike "an error in the trial process itself . . . structural defects in the constitution of the trial mechanism" can never be harmless. *Arizona v. Fulminante*, 499 U.S. 279, 309-310 (1991). Thus, this Court has refused to find harmless error when the right to jury trial has been "altogether denied," because in such a case "the wrong entity judged the defendant guilty." *Rose v. Clark*, 478 U.S. 570, 578 (1986).

That is precisely the case here. The error was not one by the trial judge, or in the trial

process, but rather in the statutory structure governing capital sentencing – a classic "structural defect in the constitution of the trial mechanism" – that "altogether denied" capital defendants their Sixth Amendment right to have eligibility determinations made by a jury beyond a reasonable doubt. The Arizona statute assigned to the "wrong entity" – the judge – the job of determining the defendant's guilt as to those determinations. As the two *Ring III* dissenters recognized, harmless error review in cases like this "puts the [appellate court] in the position of speculating about one of the great unknowables-what a non-existent jury would have done." *Ring III*, 65 P.3d at 948 (Feldman, J., joined by Chief Justice Jones, concurring in part and dissenting in part). Harmless error analysis cannot apply in such a case.

B. The Jury Trial Right Recognized in Ring Properly Applies to Aggravating Factors Involving Convictions for Other Criminal Conduct: Almendarez-Torres Should be Overruled.

As Justice Thomas' concurrence in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) shows, this Court's decision in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), suffered from the same constitutional error as *Walton v. Arizona*, 497 U.S. 639 (1990). Petitioner argues that the prior conviction aggravating circumstance found by the trial judge should have determined the outcome here because it exempts the case from the decision in *Ring II*. Thus, if certiorari were granted here, the case will necessarily present the threshold question of whether, in light of the history reviewed there and in *Ring*, this Court should overrule *Almendarez-Torres*.

The Arizona Supreme Court relied on *Almendarez-Torres* in finding the trial judge's determination of the prior conviction aggravating factor harmless. This is problematic for several reasons. First, it misapprehends the holding in *Almendarez-Torres*. As *Apprendi* noted, the defendant in *Almendarez-Torres* presented "no question concerning the right to a jury trial."

Apprendi, 530 U.S. at 488. That question was presented in *Ring II*, where this Court held that "[c]apital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Ring II*, 122 S. Ct. at 2432 (emphasis added). The fact of prior conviction squarely meets that description. *See also Apprendi*, 530 U.S. at 487, 489-90.

Moreover, Justice Thomas, voting with a five-member majority in *Apprendi*, determined that his vote in the majority of *Almendarez-Torres* was error. 530 U.S. at 518-21 (Thomas, J., concurring). Thus, it is plain that a five-Justice majority of this Court no longer adheres to that decision.

Third, even if *Almendarez-Torres* remains applicable in the application of *Ring II* in some states, its logic does not apply in Arizona. The statute at issue in *Almendarez-Torres* was a recidivist statute. This distinction compelled the result in that case because recidivism is "a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence," 523 U.S. at 243 (citations omitted), and thus was not an element of the offense in question. *Id.* at 243-244. Arizona, conversely, elected in the capital context to make prior convictions not a penalty for recidivism, but an element of the crime of capital murder as much as any other aggravating factor listed in A.R.S. § 13-703(F). As that Court has explained on numerous occasions:

> Our death penalty statute is not a recidivist or enhancement statute used to warn convicted criminals or encourage reform. . . . The purpose of the aggravation/mitigation hearing is to determine the character and propensities of the defendant. . .. That a defendant has been found guilty of another offense for which life is imposable is directly relevant to this determination. . . . *State v. Walden*, 905 P.2d 974, 994-995 (1995)(citations omitted).

Therefore, Arizona's death sentencing statute explicitly treats prior convictions as elements

of the crime of capital murder, not as recidivist penalty enhancements, and thus does not fall within the narrow exception carved out in *Almendarez-Torres*, but falls squarely within the mandate of *Ring II*. Thus, even if this Court were to grant the petition for writ of cert and reverse the opinion of the Arizona Supreme Court, Mr. Canez would still be entitled to re-sentencing under Arizona law.

C. The Jury Trial Right Recognized in Ring Properly Applies to the Aggravation/Mitigation Balance in States Which Make That Assessment an Eligibility Factor.

Although this Court did not reach the question in *Ring II*, the Arizona Supreme Court's analysis of the weighing question is also correct under federal law. The rule of *Ring II* is this: "[c]apital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." 536 U.S. at 588. Put in context, if a state conditions a sentence of death on the fact that mitigating factors do not outweigh aggravating factors, a jury determination is required. Arizona has done precisely that. The weighing finding in Arizona is not, and never has been, a stage at which the factfinder selects whether or not the defendant should receive death. In fact, until and unless the weighing factor is found, a defendant is categorically excluded from receiving the death penalty. *Ring II* requires that the jury verdict "reflect" the facts the jury found beyond a reasonable doubt "necessary to put . . [the capital defendant] to death." *Ring II*, 536 U.S. at 609. Because the weighing calculus is a necessary factor in an Arizona death sentence, it must be found by a jury beyond a reasonable doubt.

A consensus has developed among all but two death sentencing states that this factor must be determined by a jury, indicating almost total acceptance that the weighing fact is indeed an element of capital murder. This broad recognition in all relevant states that weighing is an element of the crime of capital murder adds force to Justice Breyer's concurring opinion in *Ring II*, and

merits further review by this Court.

D. The Logic of Ring II, and Developments Since Ring II, Make it Apparent That Judge Only Capital Sentencing is Unconstitutional Under the Sixth, Eighth and Fourteenth Amendments, and Spaziano and Cabana Should be Overruled.

The Constitution requires special safeguards in capital cases. *Gregg v. Georgia*, 428 U.S. 153 (1976). In addition to all of the reasons set forth in Justice Breyer's concurring opinion in *Ring II*, the evidence of legislative and judicial agreement since *Ring II* that the weighing of aggravating and mitigating circumstances is an element of the crime of capital murder demonstrates juries must make the ultimate sentencing decision. If this Court grants Arizona's request for certiorari review, this Court should also consider that evolving standards of decency require *Spaziano v. Florida*, 468 U.S. 447 (1984), be overruled on that basis.

Considering statutes enacted both before and after *Ring II*, 36 states have now given sentencing authority to juries. Only Montana and Nebraska fail to do so. Mont. Code Ann. § 46-18-301; Neb. Rev. Stat. § 29-2521. All but three of the 36 states make jury determinations of sentence controlling. This is an overwhelming indication that jury sentencing is required by the Eighth Amendment and is an established part of due process. *See Atkins v. Virginia*, 536 U.S. 304, 314-315 (2002)(discussing 8 states which prohibit execution of the mentally retarded in judging evolving standard of decency by legislative decision), *Enmund v. Florida*, 458 U.S. 782, 789 (1982)(noting that only eight states permitted death sentences in cases where defendant participated in underlying felony but did not attempt or intend to kill). Given the nearly unanimous enactment of jury sentencing by state legislatures, Justice Breyer's dissent in *Ring II* is correct. *Spaziano v. Florida*, 468 U.S. 447 (1984), and *Cabana v. Bullock*, 474 U.S. 376 (1986), should be overruled and these questions, too, will necessarily be included in the issues presented by this case, if certiorari is

granted here.

E. The Arizona Courts Violated Lockett v. Ohio and Eddings v. Oklahoma By Disregarding Mitigating Evidence Where It Is Not Shown To Cause The Defendant's Conduct At The Time Of The Crime.

1. Evidence of a Traumatic Family and Developmental History Is Relevant Mitigating Evidence.

This Court has repeatedly stressed the important and unquestionably mitigating nature of evidence that a capital defendant suffered from childhood abuse, even when the evidence is completely unrelated to the crime for which the defendant is sentenced. *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)("There can be no doubt that evidence of a turbulent family history, [and] of beatings by a harsh father ... is particularly relevant [to mitigation]."); *Penry v. Lynaugh*, 492 U.S. 302, 322 (1989)(evidence of childhood abuse is relevant to a capital defendant's "moral culpability" and jurors must be allowed to consider that evidence in assessing punishment); *Burger v. Kemp*, 483 U.S. 776, 789, n.7 (1987)(there is "no doubt" that evidence of a defendant's "exceptionally unhappy and unstable childhood" is "relevant mitigating evidence"). This Court finds evidence of childhood abuse relevant and undeniably mitigating. And this Court does not restrict the consideration of mitigating factors to only those shown to have caused defendants' actions at the time of the crime. *See Williams (Terry) v. Taylor*, 120 S.C. 1495, 1512-1514 (2000)(reversing for defense counsel's failure to investigate and present evidence that documented childhood abuse). Evidence of childhood abuse must be considered as non-statutory mitigation, even if that evidence does not provide a legal excuse from criminal responsibility. *Eddings*, 455 U.S. at 114.

Obviously, extensive childhood abuse and neglect damages one's emotional health. "It defies reason and common experience to suggest that a youngster coming out of [a horrific environment]

was largely unaffected and should be held accountable as any functioning adult." *State v. Hoskins*, 14 P.3d at 1031 (Zlaket, C.J., dissenting). As Chief Justice Rehnquist recognized, "A stable, loving homelife is essential to a child's physical, emotional, and spiritual well-being. It requires no citation of authority to assert that children who are abused in their youth generally face extraordinary problems developing into responsible, productive citizens." *Santosky v. Kramer*, 455 U.S. 745 (1982). Although medical science is not yet fully capable of quantifying and tracing the causal relationship between such abuse and criminal behavior, medical literature does reveal how childhood physical abuse may have long-term negative repercussions for the defendant's ability to make appropriate judgments, to understand the consequences of his actions, and to control his behavior. Phyllis L. Crocker, *Childhood Abuse and Adult Murder: Implications For The Death Penalty*, 77 N.C.L.Rev 1143, 1185 (1999).

A sentencer must not be precluded from considering a capital defendant's proffered mitigating evidence of "any aspect of defendant's character, or record, and any of the circumstances of the offense" in all but the rarest of cases. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Evolving standards of decency and "the fundamental respect for humanity underlying the Eighth Amendment" require individualized sentencing "as a constitutionally indispensable part of inflicting the death penalty." *Eddings v. Oklahoma*, 455 U.S. at 114, *quoting Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). Evidence of childhood abuse is relevant in sentencing because "defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable" than others. *Penry*, 492 U.S. 302, 319 (1989), *quoting California v. Brown*, 497 U.S. 538, 545 (1987) (O'Connor, J., concurring).

The sentencing body must have a vehicle for assessing the mitigating nature of the evidence

that reflected on the defendant's personal culpability to determine what sentence is warranted. *Penry*, 492 U.S. at 322. "Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence." *Eddings*, 455 U.S. at 114. Although courts "may determine the weight to be given relevant mitigating evidence[,]" they "may not give it no weight by excluding such evidence from their consideration." *Id.*, 455 U.S. at 115. Restricting consideration of mitigation creates a risk of an inappropriately severe sentence. *Lockett*, 438 U.S. at 605. Since "the qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed," *Id.* at 604, states must be able to consider the mitigating evidence of childhood abuse without having to first find a causal connection between the abuse and the crime. Since it is mitigation, the sentencer should include it in the weighing process.

2. The Arizona Courts Flatly Refuse to Recognize This Court's Prior Holdings That a Traumatic Upbringing Is Mitigating Evidence.

Canez' horrific childhood and resulting emotional troubles were clearly established in a court of law by a preponderance of the evidence. The Arizona Supreme Court agreed that Canez had a traumatic childhood and was mentally ill and impaired. Although the Arizona Supreme Court found Canez' proffered evidence credible, it refused to consider this evidence as mitigation because there was no "causal nexus" between his abysmal childhood and his appreciation of the wrongfulness of the conduct or ability to control his conduct.

Courts in other jurisdictions have faithfully followed this Court's precedent and determine that evidence of a traumatic upbringing is mitigating. Arizona, however, regularly dismisses uncontroverted evidence of childhood abuse as irrelevant in the absence of proof that it somehow

caused the crime. The Arizona Supreme Court has historically restricted its consideration of mitigation where a defendant proves that he suffered an abusive childhood. The Court repeatedly refuses to consider evidence of a dysfunctional family as mitigation without a causal connection to the defendant's ability to perceive, comprehend, or control his actions. *See State v. Sansing*, 26 P.23d 1118, 1131 (2001); *State v. Hoskins*, 14 P.3d 997, 1023 (2000); *State v. Sharp*, 193 Ariz. 414, 973 P.2d 1171 (1999); *State v. Mann*, 188 Ariz. 220, 231, 934 P.2d 784, 795 (1997); *State v. McKinney*, 185 Ariz. 567, 587, 917 P.2d 1214, 1233 (1996); *State v. Laird*, 186 Ariz. 203, 920 P.2d 769 (1996); *State v. Murray (Robert)*, 184 Ariz. 9, 906 P.2d. 542 (1995); *State v. Walden*, 183 Ariz. 595, 905 P.2d 974 (1995); *State v. Ross,* 180 Ariz. 598, 886 P.2d 1354 (1994), *cert. denied*, 516 U.S. 878 (1995). Sentencing judges are prevented, as a matter of Arizona law, from considering proven evidence of a difficult upbringing unless a causal connection is established.

A dysfunctional family background or difficult childhood can be mitigating only if the defendant can establish that early experiences, however negative, affected later criminal behavior in ways that were beyond his control. Thus, family dysfunction ... can be mitigating only when actual causation is demonstrated between early abuses suffered and the defendant's subsequent acts. *Hoskins*, 14 P.3d at 1021. "The factual circumstances of defendant's childhood, though extremely difficult, do not translate into relevant mitigation of his premeditated crimes." *Id.* (emphasis added).

The Arizona statute challenged herein, A.R.S. § 13-703, was found over 13 years ago in *Walton v. Arizona* to be constitutional because Mr. Walton was "not complaining that the Arizona statute or practice excludes from consideration any particular type of mitigating evidence," but instead was challenging the burden of proof by which mitigation should be considered. 497 U.S. 639, 649 (1990). This Court expressly stated that it "has refused to countenance state-imposed

restrictions on what mitigating circumstances may be considered in deciding whether to impose the death penalty." *Id.* "A state may not preclude by statute, nor may a sentencer refuse to consider, any relevant mitigating evidence." *Eddings*, 455 U.S. at 114.

Since *Walton*, however, the Arizona Supreme Court has repeatedly excluded an entire category of mitigating evidence offered by capital defendants: mitigating factors that could not be or were not proven to have caused the crime. Arizona courts are not able to consider a difficult childhood as mitigation, statutory or non-statutory, unless the causal connection is established; thus, entire types of mitigation are precluded in violation of the rule set forth in *Walton.*

This Court found such practice impermissible, where "the sentencing judge did not evaluate the evidence and find it wanting as a matter of fact; rather he found that as a matter of law he was unable to even consider the evidence." *Eddings*, 455 U.S. at 113. A categorical denial of credible evidence of a traumatic childhood because it did not cause the crime is tantamount to denying that evidence as a matter of law. There is a valid distinction between merely disbelieving evidence which a defendant offers and precluding consideration of that mitigating evidence altogether when it is proven. The latter approach, which Arizona takes, is unconstitutional.

After all mitigating evidence is allowed in for consideration, then federal law allows states to structure their consideration of mitigating factors. For example, if a state decided to give more weight to the mitigating factor of age than to the mitigating factor of good behavior in prison, it could do so. Here, there was no "vehicle," under Arizona law, for the sentencing court to "express[] its 'reasoned moral response'" to the mitigating evidence. *See Penry I,* 492 U.S. at 328, and *Eddings*, 455 U.S. 104. A sentencing scheme that precludes individualized sentencing "excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or

mitigating factors stemming from the diverse frailties of mankind." 492 U.S. at 304. Thus, the causal connection requirement, which excludes relevant evidence and deems it irrelevant, is a direct violation of the Eighth Amendment protections carved out in *Lockett*, *Eddings*, and their progeny.

CONCLUSION

Because the Arizona Supreme Court's decision rests on state law, because this case likely will be disposed of under *Atkins v. Virginia* and thereby rendered moot and because the disposition of the case is correct for a number of reasons in addition to those adopted by the Arizona Supreme Court, the petition for certiorari should be denied. If the petition is granted, the Arizona Supreme Court's decision should be affirmed for all the reasons set out above.

RESPECTFULLY SUBMITTED,

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